

A WISCONSIN DEPARTMENT OF JUSTICE GUIDE FOR LAW ENFORCEMENT CONTACTS WITH FOREIGN NATIONALS

Introduction

The purpose of this Wisconsin Department of Justice guide is to assist Wisconsin law enforcement officers when dealing with foreign nationals, focusing on both mandatory legal requirements as well as important policy considerations. This guide is meant as an informational tool for law enforcement when confronted with a subject who is or might be a foreign national. However, it is not intended by the Wisconsin Department of Justice to supplant sheriff or police department policies and procedures or specific advice law enforcement may receive from local counsel.

There are a myriad of requirements and issues that may arise when law enforcement deals with foreign nationals. The Attorney General trusts this guide will be useful for Wisconsin law enforcement in handling these situations.

Definition of Key Terms and Acronyms

Absconder Category

A category of IVF located in NCIC containing records for individuals with an outstanding administrative warrant of removal from the United States and who have unlawfully remained in the United States. A “hit” for this category indicates a criminal immigration violation.

Consular Notification

Under the VCCR when a foreign national is arrested or detained they must be advised of their right to have their consular officials notified.

Consular Offices

Offices that are employed by foreign governments in host countries to provide assistance to its nationals.

Deported Felon Category

A category of IVF located in NCIC containing records for previously deported felons convicted and deported for drug trafficking, firearms trafficking, or serious violent crimes. A “hit” for this category indicates a criminal immigration violation.

Diplomatic Immunity

Certain privileges and immunities offered by the United States to members of foreign diplomatic missions and consular posts. While this immunity can shield its holders from criminal prosecution in the United States, offenders remain subject to ramifications in their own country

Foreign National

A foreign national or alien is anyone who is not a citizen or national of the United States. (INA: Act 101(3)). Individuals born in the United States, individuals born in another country with a citizen parent, and individuals who have been naturalized are citizens of the United States.

ICE

US Immigration and Customs Enforcement

INA

Immigration and Nationality Act

IVF

Immigration Violators File. Consists of immigration violators entered in the NCIC.

LESC

Law Enforcement Support Center. The LESC is administered by ICE and is a contact point for law enforcement providing 24/7 information and support. For information on how to access the LESC contact: LESC Computer Services Division, 188 Harvest Lane, Williston, Vermont 05495, 802-872-6050, or 802-872-6020

NCIC

The National Crime Information Center. A database used to determine whether an individual has committed a civil or criminal immigration violation.

NSEERS Category

The National Security Entry-Exit Registration System. A category of IVF located in NCIC containing records for individuals who are subject to monitoring for national security or law enforcement interests while in the United States. A "hit" for this section indicates a civil immigration violation.

VCCR

Vienna Convention on Consular Relations. A treaty which provides rules for the operation of consulates and the functions of consuls and honorary consuls. Whenever a foreign national is arrested or detained in the United States the rules of the VCCR apply.

WSIC

Wisconsin State Information Center. The state wide information center which can be accessed by law enforcement at 1-888-DCI-WSIC

Dealing with Foreign Nationals during traffic stops and other "Terry" stops

Law enforcement officers may not stop vehicles solely on the basis of racial or ethnic profiling simply to question the passengers about immigration or citizenship status. Further, when officers make a lawful stop, they may not ordinarily detain the vehicle's passengers beyond the period required for disposition of the matter that justified the initial stop.

The United States Supreme Court has held that reasonable suspicion of an INA violation is not needed in order to ask any lawfully detained individual about his or her immigration status. Muehler v. Mena, 544 U.S. 93 (2005). Thus, there is no 4th Amendment violation if an officer asks the driver of a vehicle that was lawfully stopped about immigration status.

Officers are not obligated by State or Federal law to question individuals about their immigration status. While an officer may ask an individual about his or her immigration status during a stop, the individual does not have to respond. Officers have the authority to determine the identity of a

driver of the vehicle, including the right to ask for identification necessary to run an NCIC record check. Officers can run an NCIC record check when individuals are lawfully stopped.

While officers may not compel passengers to identify themselves in most circumstances, officers may ask passengers to provide information that permits them to conduct an NCIC record check. However, the officer has no recourse if the passenger refuses to provide identifying information. Officers should not request immigration documents, but they may consider immigration documents drivers and passengers provide to them for purposes of conducting an NCIC record check.

Key Points:

- Law enforcement may not stop a person or a vehicle for the sole purpose of determining their immigration or citizenship status absent a reasonable suspicion of a violation of law, including immigration laws.
- The police can ask a person lawfully stopped about their immigration status.
- The police can do NCIC checks of all people lawfully stopped.
- While the police can ask passengers for identifying information the passenger can refuse to provide it.

Dealing with NCIC information about Foreign Nationals

Once the officer has done an NCIC check on a lawfully stopped person the officer may discover that the subject has a criminal or civil immigration violation status. There are three primary IVF categories entered into NCIC. These three categories are 1) Deported Felon 2) Absconder, and 3) NSEERS. The procedure to follow differs depending on which kind of violation is involved.

Criminal Immigration Violation (Deported Felon, Absconder)

Wisconsin law enforcement officers have the legal authority to enforce federal criminal immigration status violations. Criminal immigration violations include absconders and deported felons. Consequently, Wisconsin law enforcement officers may arrest subjects whose NCIC report show that the subject has federal criminal immigration status violations. Before doing so, however, law enforcement must check with LESC to confirm the “hit” from NCIC. Of course, the officer may arrest the subject for any criminal violation under Wisconsin law regardless of the subject’s immigration status.

Civil Immigration Violation (NSEERS)

Wisconsin law enforcement officers do not have the legal authority to enforce federal civil immigration status violations. Civil immigration violations include being illegally present in the United States and failure to depart after the expiration of a visa. Accordingly, if the NCIC check shows the subject to be an illegal alien, a “hit” for the NSEERS category, this is not sufficient in and of itself to justify further detention or an arrest. After the subject is released there is nothing to compel or to prohibit law enforcement from reporting the offender to ICE. The Wisconsin Attorney General recommends, however, that law enforcement report such offenders to ICE or to the WSIC, which will report the offenders to ICE.

However, the officer may detain or arrest the subject for suspected violations of Wisconsin law.

Notification if there is a “hit” on person arrested for some violation of Wisconsin law

If an individual is arrested or detained based on an independent legal basis under Wisconsin law, and an NCIC “hit” indicates an NSEERS violation, or the individual’s immigration status is questioned, the LESC may be contacted. Thus, while state law enforcement does not have the authority to arrest based on civil immigration violations, they may contact the LESC if the individual is otherwise lawfully detained.

Key Points:

- NCIC has three categories of immigration violations. Deported Felon, Absconders, or NSSERS
- Wisconsin law enforcement can enforce criminal immigration status violations- Deported Felon, or Absconder categories. However before arresting, the subject law enforcement should confirm the “hit” from NCIC with the LESC
- Wisconsin law enforcement cannot enforce civil immigration status violations- the NSSERS category. Therefore, the officer must release the person without delay but it is recommended by the Wisconsin Attorney General that law enforcement contact ICE or WSIC, after the person is released.
- Law enforcement may arrest or detain any subject regardless of their immigration status as reflected by NCIC, if they have suspicion or probable cause that the subject has violated Wisconsin law.

Dealing with Foreign Nationals after arrest – Consul Notification

If a subject is arrested for any violation of Wisconsin law and there is a concern that the subject might be a foreign national, the Wisconsin Attorney General recommends that during the booking process inquiry be made about the detainee’s immigration status. This can be handled with a booking form question about the detainee’s citizenship.

Right to Consul Notification

If law enforcement determines that the arrested subject is a foreign national then law enforcement is obligated by the VCCR to follow consular notification procedures. The procedure requires law enforcement to advise the arrested subject of their right to have their consular officials notified. Under the VCCR, consular notification is an option as the arrested subject may choose to have his/her consulate notified or not notified. However, the United States has also entered into bilateral agreements with some countries which require mandatory notification regardless of the arrested subject’s wishes.

There is no obligation to advise subjects of their right to consular notification under the VCCR for traffic stops or other brief periods of detention.

Procedure When the Consulate is to be Notified

Once the subject indicates a wish to have his/her consulate notified or the notification is mandatory, law enforcement should contact the appropriate consulate without delay. Many countries have multiple consular offices in the United States and consular notification should be

made to the nearest office. The US Department of State resources provide a list of consulates and contact information. While notification can be made by phone or fax, faxing is recommended both for convenience and for creating a record of the notification.

Law enforcement may make reasonable regulations relating to consul access to arrested individuals but the regulations cannot be so restrictive that the purpose of consular assistance is defeated. The Department of State urges that consuls be given liberal access and liberal visiting privileges and allowed whatever access they need within “reasonableness”. Interrogations do not have to be delayed in order to wait for consul officers. Also, there is no requirement that the arrested subject speak with a consul right away. The requirement is that the consulate be notified as quickly as possible.

Determining when Notification is Necessary - Examples

- Example 1: John Smith is arrested. During booking it is discovered that Mr. Smith is a national of Ruritania. Ruritania is not a mandatory notification country and Mr. Smith does not want his consulate to be notified. How should the officer proceed?
A. In this situation notification is a choice for Mr. Smith and his choice should be respected.
- Example 2: Mike Miller is arrested. During booking it is discovered that Mr. Miller is also a national of Ruritania. Mr. Miller states that he wants his consulate to be notified. How should the officer proceed?
A. The officer should notify the Ruritanian consulate without delay.
- Example 3: Jane Jones is arrested. During booking it is discovered that Ms. Jones is a national of Paltana. Paltana is a mandatory notification country, but Ms. Jones is seeking asylum and does not want her consulate to be notified. How should the officer proceed?
A. The officer is obligated to notify the Paltanan consulate despite Ms. Jones wishes because it is a mandatory notification country. The officer should make the notification without delay. However, the officer should not disclose to the consulate that Ms. Jones is seeking asylum.

Ramifications for Consul Notification Violations

Under Wisconsin law, a consular notification violation does not result in the suppression of evidence or any other judicial remedy. However, compliance is important as following consular notification rules ensures that Americans traveling abroad will receive similar notification rights if they are arrested. Moreover the VCCR is a treaty between nations and invokes international law. In the past the International Court of Justice has been involved in cases of VCCR violations between countries. The United States would like to avoid violating its international commitments and law enforcement can help by avoiding violating consular notification rules.

Contact Information as to Consular Notification

Consular Notification and Access training materials can be ordered or downloaded online. The materials include a detailed Consular Notification and Access booklet (highly recommended), posters outlining the basic procedures, posters of notice translations, and officer pocket cards. These resources also provide a list of mandatory notification countries and consulate contact information.

Address: Office of Public Affairs and Policy Coordination CA/P, Room 4800

Bureau of Consular Affairs, U.S. Department of State, Washington, DC 20520
Telephone: (202) 647-4415, after hours (202) 647-1512
Fax: (202) 736-7559
Email: consnot@state.gov
Website: http://travel.state.gov/law/consular/consular_2003.html
More information is also available through WSIC, at 1-888-DCI-WSIC.

Dealing with Foreign Nationals who are Victims

All victims should be treated with dignity and respect. If questions arise during contact with a foreign national victim, law enforcement can obtain further information by contacting the Wisconsin Department of Justice, Office of Crime Victim Services at 1-800-446-6564.

Key Points:

- The VCCR gives foreign nationals the right to consular notification if arrested in the United States
- The best way to provide this notification is during the booking process, and the Wisconsin Attorney General recommends that during the booking process, an inquiry be made about the detainee's immigration status.
- The foreign national can choose to have his/her consulate notified or choose not to unless they come from a country who has signed a mandatory notification agreement with the United States
- Once the subject requests that their consulate be notified, notification should be made as soon as possible.
- While suppression is not a remedy for a violation of the notification requirement it is important to comply with the requirement as it ensures that our citizens traveling abroad will be treated similarly

Diplomatic and Consulate Immunity

The United States extends privileges and immunities to members of diplomatic missions and consular posts so as to ensure the efficient and effective performance of their official missions on behalf of their governments. There are various levels of immunities and privileges extended depending on the position or status of the individual. Each individual with immunity is given an identification card issued by the Department of State. The cards are colored coded for different positions and specific immunity information is listed on the back of each card.

Determining if an Individual is Entitled to Immunity

If an individual presents a diplomatic or consular identification card, or states that they are entitled to immunity, law enforcement should ascertain the validity of this statement prior to proceeding. In some cases the individual cannot be detained or arrested due to immunity. If a card is presented, the officer should examine the card and refer to the back of the card for specific immunity privileges and information. In all situations, whether a card was presented or the officer was notified verbally, the officer should contact the Department of State to confirm the individual's status and specific immunities or privileges. Confirmation can be made a day at

the Office of Protocol- 202-647-1985 during business hours and after hours at the Diplomatic Security Command Center- 571-345-3146 or 1-866-217-2089.

All diplomats or consular officials may be issued traffic citations.

Handling a Situation Involving an Individual with Confirmed Immunity or Privileges

If an individual's immunity prevents them from being arrested or detained, officers should release the individual without delay. However, if it is unsafe to release the individual, officers should not place the individual's immunity before the safety of others.

- Example: if a diplomat with immunity is stopped for driving under the influence, the officer should not allow the individual to continue driving. Instead the officer should find a safe alternative while still respecting the individual's status (i.e. contacting assistance for the diplomat or even offering a "safe ride" to the diplomat).
- Example: if an individual with immunity is physically threatening the safety of others, an officer may restrain the individual as necessary in order to protect the public without actually arresting the individual.

What you can do with a Person who has Diplomatic or Consular Immunity

Even though you typically must immediately release a person who has immunity, the immunity does not preclude law enforcement from continuing its investigation into the matter. If the investigation clearly reveals that the holder of immunity has committed a serious crime the United States can ask the holder's country for an immunity waiver, which if granted would allow for US prosecution. Second, even if such a waiver is denied the holder's country can either revoke their status or if they wish prosecute them under their own laws.

Key Points:

- Members of diplomatic missions and consular posts have certain privileges and immunities
- Each individual with immunity is given an identification card issued by the Department of State, which is color coded for different positions and immunities
- If an individual's immunity prevents them from being arrested or detained, officers should release the subject without delay unless it is unsafe to do so

Summary

Dealing with foreign nationals presents challenges and obligations for law enforcement. If the person being detained or arrested receives a "hit" from NCIC as to an immigration violation, the officer may arrest if the violation is a criminal immigration violation but may not do so if it is a civil immigration violation. Any positive "hits" from NCIC for a criminal immigration violation must be confirmed with LESC. While not required to do so, the Wisconsin Attorney General recommends that law enforcement report any civil immigration violations to ICE or to WSIC.

When a foreign national is arrested for a violation of state law, law enforcement must notify the subject of his/her right to have their consulate notified. Law enforcement should then determine if the individual is from a mandatory or optional notification country. Only when a person is

from an optional notification country and chooses not to notify can law enforcement refrain from notifying the consulate. The consulate should be notified as soon as possible and the consul should be allowed liberal access. It is important to comply with consulate notification obligations so that Americans can be provided similar protections abroad.

Some foreign nationals are here representing their countries and are afforded diplomatic or consular immunity based on their position. Once immunity has been verified, law enforcement should take actions consistent with immunity but should always keep public safety first.